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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CHRISTINA RITTER HOOK, Defendant and Appellant.	D074012 (Super. Ct. No. SCN382632)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Conditionally reversed with directions.

Thien Huong Tran, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Lynne G. McGinnis and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

After loitering in a parking lot for several hours and acting in a strange manner, Christina Hook found keys in an unlocked vehicle, took the car, drove it out of the lot, brought it back shortly after, and locked the keys inside the vehicle. Based on this incident, the jury found Hook guilty of unlawful driving and withholding/concealing a stolen vehicle. (Veh. Code, § 10851, subd. (a); Pen. Code, § 496d.)[1] Hook admitted an enhancement allegation that she had previously been convicted of a felony vehicle theft. (§ 666.5, subd. (a).)

The court suspended the imposition of sentence for five years and granted formal probation. The court ordered Hook to serve 270 days in jail, with 212 days of presentence custody credit.

Hook appealed, contending the court erred in including electronic devices in her Fourth Amendment waiver probation condition. The challenge is moot because the court has since revoked her probation.

In a supplemental brief, Hook requests that we remand the matter to allow the court to consider granting her diversion under the mental health diversion law for defendants diagnosed with qualifying mental health disorders. (§ 1001.36.) This law became effective about six weeks after Hook's sentencing hearing. (Stats. 2018, ch. 34, § 24.) We conclude the mental health diversion law applies to this case, and Hook met the minimal burden necessary to trigger a hearing for the court to exercise its discretion as to whether she qualifies for mental health diversion.

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1 All further unspecified statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL SUMMARY

Prosecution Case

In January 2018, restaurant employees observed Hook wandering around the parking lot for several hours in the afternoon. She was walking near the cars and looking through the windows. She appeared disoriented and disheveled. Several times, she came into the restaurant making comments or asking questions that were not understandable. She did not make eye contact and was mumbling. At one point, she came into the restaurant with a set of keys, and appeared to want to drop the keys off for someone. She also was "spinning" in front of the restaurant window.

At about 3:15 p.m., one of the restaurant employees noticed Hook driving an older model Nissan vehicle out of the parking lot. Less than 30 minutes later, the car was parked back in the lot. Later investigation showed the Nissan was owned by a woman who worked as a housekeeper at a nearby hotel. The housekeeper's husband had left the car for her in the parking lot with the door unlocked and the keys under the driver's floor mat. When the housekeeper returned to her car later that day, the car was locked; the keys were visible on the driver's floor mat; and the car's registration slip was on top of the trunk. Neither the housekeeper nor her husband knew Hook or had given Hook permission to drive the car.

When questioned by officers, Hook initially gave a different name. She admitted she had been looking into vehicles, but said it was a "sobriety game." She acknowledged she had been sitting inside the Nissan vehicle, but said it was her friend's car. The police officer did not think Hook was under the influence of narcotics, and also did not believe

she was in need of a Welfare and Institutions Code section 5150 involuntary hold. She appeared calm and accepting of the police involvement.

Hook was charged with unlawful driving of a vehicle (Veh. Code, § 10851, subd. (a)), and receiving, concealing, or withholding a stolen vehicle (§ 496d). As to both counts, it was alleged she was previously convicted of felony vehicle theft. (§ 666.5, subd. (a).)

Defense Case

At trial, Hook did not testify or call any of her own witnesses. Her counsel admitted she drove the Nissan without permission, but suggested she may have done so mistakenly, emphasizing the evidence that she did not attempt to conceal what she was doing and instead was calling attention to herself throughout the day.

Verdict

After the jury found her guilty on both counts, Hook admitted the prior conviction allegation. When scheduling the sentencing hearing, the court said to defense counsel, "you might want to get some kind of psychological evaluation . . . to give to the probation department." Hook's attorney later arranged for a psychiatric evaluation with Dr. Jaga Glassman, and provided the report to the court and the probation officer.[2]

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[2] We grant Hook's unopposed motion to augment the record with Dr. Glassman's report.

Probation Report

The probation report states that 36-year-old Hook was homeless and a transient at the time of the offense. She told the probation officer she graduated from a local high school in 1999, earned a psychology degree from San Diego State University in 2010, and is currently attending San Marcos State University "working on a joint master's/doctorate degree and is currently finishing up her dissertation." She said her dissertation is "on the 'homeless' " and she has therefore " 'immersed' herself on the 'streets' for the past six months."

Hook has three children who live with her former husband. She reported that she has a close relationship with her mother, and that she plans to live with her mother upon her release. She said she previously worked as a hospital operations supervisor. She denied being diagnosed with any type of mental health disorder and claimed she had not been prescribed any medications. She also denied having an alcohol or drug problem, but admitted that she has experimented with drugs, including using heroin and methamphetamine "one to two times only for her 'own knowledge' of how her 'body reacts to the drugs.' "

After considering all relevant circumstances, the probation officer recommended the court grant formal probation, noting Hook "has yet to exhaust local rehabilitative resources or be supervised by a Probation Officer."

Sentencing Hearing

At the May 15, 2018 sentencing hearing, defense counsel urged the court to adopt the probation department's recommendation. Counsel stated that Hook's criminal history

began at the end of 2017, and that it did not appear drugs were a factor in the case. Counsel also stated:

> "[W]e do know that from trial and the witnesses' testimony, Ms. Hook's behavior was less than normal, including varied speech to the [restaurant] employees, confused speech, spinning in front of the . . . restaurant, conflicting statements to law enforcement . . . .
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> ". . . Dr. Glassman's report and also the follow-up with Dr. Glassman's report after he actually spoke with Ms. Hook's father, . . . gives us some insight as to how Ms. Hook arrived at this place, where she's come from. [¶] I think that . . . the nexus for [her criminal] cases are mental health-related. . . .
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> ". . . I have gone over the probationary terms with her. She does agree to comply. I think it would be premature to send her to prison . . . , especially in light of her mental health issues. . . . [T]he probation department is in receipt of Dr. Glassman's report . . . [and] with her diagnosis and with some insight into her mental health issues, I think a referral to [a] M.I.O. unit would be beneficial to give Ms. Hook the additional types of supervision that would help her remain law-abiding and really address her mental health issues. I do think that if we could resolve those issues or at least manage them, that we're not going to see Ms. Hook back in our criminal justice system."

The prosecutor responded by arguing that Hook was not a suitable candidate for probation. She emphasized that no evidence of a mental health condition was presented at trial; the evidence showed Hook acted in a "conscious" state when she committed the crime and harbored the requisite mental state; and she was convicted for the same crime less than one year earlier and was on probation when she committed the current crime. The prosecutor thus urged the court to impose a two-year prison sentence.

After considering these arguments and reviewing the relevant reports (including Dr. Glassman's report and his supplemental report), the court concluded probation was

the appropriate disposition. The court reasoned that Hook had suffered "some significant traumatic events" that "clearly [have] taken a toll on her mental health" and "it's clear to me Ms. Hook needs some assistance if she can get it [and] [a] sentence in state prison at this time doesn't accomplish that end."

The court suspended the imposition of sentence, and imposed formal probation for five years "with the ability to reduce it to three if the defendant demonstrates successful compliance with probation." The court also imposed numerous probation conditions, including a requirement that Hook participate in the behavioral health supervision unit and that Hook waive her Fourth Amendment search and seizure rights, including searches of her electronic devices.

DISCUSSION

I. *Electronics Search Waiver Condition*

Hook contends the court erred in imposing the electronics-search probation condition because it is unconstitutionally overbroad.

The contention is moot because Hook's probation was revoked in November 2018. We grant the Attorney General's unopposed request to take judicial notice of the probation revocation and sentencing order. The order shows that on November 5, 2018, the court revoked Hook's probation and sentenced Hook to a total of two years with a credit of 389 days.

A probation condition becomes moot when the condition is no longer in effect because of the occurrence of some event. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 879; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120, fn. 5; *In re R.V.* (2009) 171

Cal.App.4th 239, 245-246.) This mootness principle applies to a probation condition challenge after probation was revoked. (See *In re R.V.*, at pp. 245-246.) Hook has not identified any applicable exceptions to this rule.

II. *Mental Health Diversion*

In a supplemental opening brief, Hook requests that we conditionally reverse the judgment and remand the matter for a hearing to determine her eligibility for pretrial mental health diversion under section 1001.36. In response, the Attorney General contends (1) the mental health diversion law is not applicable because it was enacted after Hook was convicted and sentenced and it is not retroactive; and (2) even if section 1001.36 is retroactive, Hook failed to meet her burden to show she would qualify under the statute's six eligibility provisions. We reject these contentions.

A. *General Description of Mental Health Diversion Statutes*

Six weeks after Hook's sentencing hearing, on June 27, 2018, the Legislature added statutes authorizing trial courts to grant "pretrial diversion" to defendants diagnosed with qualifying mental disorders. (§§ 1001.35, 1001.36; see Stats. 2018, ch. 34, § 24.) "Section 1001.36 gives trial courts the discretion to grant pretrial diversion if the court finds: (1) a qualified mental health expert has recently diagnosed the defendant with a qualifying mental disorder; (2) the mental disorder was a significant factor in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not

pose an unreasonable risk of danger to public safety if treated in the community." (*People v. Cawkwell* (2019) 34 Cal.App.5th 1048, 1053; § 1001.36, subd. (b)(1)(A)-(F).)

If the court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subds. (c)(1)(B) & (c)(3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

Three months after section 1001.36 was enacted, in September 2018, the Legislature amended the statute to (1) eliminate diversion eligibility for defendants charged with certain violent offenses (not applicable here); and (2) set forth procedural rules, including that the trial court "[a]t any stage of the proceedings" may "require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion." (Stats. 2018, ch. 1005 (Sen. Bill No. 215), § 1, eff. Jan. 1, 2019.)

B. *Retroactivity*

The Attorney General recognizes that Hook's felony theft offenses potentially qualify for mental health diversion, but argues the statute is not retroactive.

Penal statutes are generally presumed to apply prospectively unless they expressly state otherwise. (§ 3.) However, under *In re Estrada* (1965) 63 Cal.2d 740, " 'an amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date.' " (*People v.*

DeHoyos (2018) 4 Cal.5th 594, 600; *People v. Weaver* (2019) __ Cal.App.5th __ , __ [2019 Cal.App. LEXIS 602, at p. *17] (*Weaver*); *People v. Floyd* (2003) 31 Cal.4th 179, 184.) " 'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' " (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308 (*Lara*).)

Applying these general principles, several Courts of Appeal, including a panel from this court, have held section 1001.36 is retroactive in cases in which the defendant was convicted and sentenced before the statute's effective date but the case was not yet final on appeal. (See *Weaver, supra,* __ Cal.App.5th ___ [2019 Cal.App. LEXIS 602, at pp. *19-27]; *People v. Frahs* (2018) 27 Cal.App.5th 784, 786, 791 (*Frahs*), review granted Dec. 27, 2018, S252220; *People v. Aguayo* (2019) 31 Cal.App.5th 758, 760, review granted May 1, 2019, S254554.)[3]

In *Weaver* and *Frahs,* the courts recognized the *Estrada* rule applies to section 1001.36 because this code section lessens punishment by giving defendants the possibility of diversion and then dismissal of criminal charges. (*Weaver, supra,* __ Cal.App.5th ___ [2019 Cal.App. LEXIS 602, at p. *19]; *Frahs, supra,* 27 Cal.App.5th at

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3 We certified our opinion in *Aguayo, supra,* 31 Cal.App.5th 758 for partial publication. Our *conclusion* that the diversion statutes apply retroactively appears in the published portion; but our *analysis* supporting this conclusion appears in the unpublished portion. The California Supreme Court granted review in *Aguayo* on a different issue.

p. 791, rev. gr.) The courts then found the statute retroactive based on its determination there was no statutory language reflecting a contrary intent. (*Weaver*, at pp. *19-27; *Frahs*, at p. 791.) The courts also have concluded that applying section 1001.36 retroactively is consistent with a primary purpose of the statute, which is to promote "[i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a); see *Frahs*, at p. 791.)

Weaver and *Frahs* further found the statute's definition of pretrial diversion, which provides the statute applies "at any point in the judicial process from the point at which the accused is charged *until adjudication*" (§ 1001.36, subd. (c), italics added), does not compel a different conclusion. "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara*, *supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal." (*Frahs, supra*, 27 Cal.App.5th at p. 791; accord, *Weaver, supra*, __ Cal.App.5th __ [2019 Cal.App. LEXIS 602, at pp. *25-27].)

The issue of section 1001.36's retroactivity is pending before the California Supreme Court. (See *Frahs, supra*, 27 Cal.App.5th 784, rev. gr.) Until the high court has given contrary directions, we continue to find the reasoning in *Frahs* and *Weaver* persuasive and conclude the statute is retroactive in a case such as this where the

defendant was sentenced after the statute's effective date but before judgment was final for appeal purposes.

The Attorney General requests that we take judicial notice of an Assembly Floor Analysis of the bill underlying section 1001.36. (Assem. Com. on Budget, Analysis of Assem. Bill No. 1810 (2017-2018 Reg. Sess.) as amended June 12, 2018), which *Frahs* declined to do. (*Frahs, supra*, 27 Cal.App.5th at p. 789, fn. 2.) We grant this request (Evid. Code, §§ 452, 459; Cal. Rules of Court, rule 8.252), but find this document does not alter our conclusion on the retroactivity issue.

The proffered bill analysis reflects that one purpose of the bill (contained in a larger budget package) was to reduce state costs, including those resulting from the large number of individuals who were being declared incompetent to stand trial and were referred to state hospitals for treatment. (Assem. Com. on Budget, Analysis of Assem. Bill No. 1810 (2017-2018 Reg. Sess.) as amended June 12, 2018.) The Attorney General argues that retroactive application of the statute after a conviction and sentencing would not reduce these costs. Although this may be true, we are unpersuaded this fact reflects legislative intent to apply the statute prospectively.

The Legislature codified the statutory purposes of the bill, and these provisions do not explicitly refer to cost concerns. (§ 1001.35.) Section 1001.35 states the "purpose of this chapter is to promote all of the following": (1) the need to mitigate the problem of individuals with mental disorders entering and reentering the criminal justice system while protecting public safety; (2) provide for local discretion and flexibility in resolving these issues, and (3) encourage programs that meet the unique mental health needs of

individuals with mental disorders. (§ 1001.35, subds. (a), (b), (c).) In discerning legislative intent, we focus on the words of the statute and resort to legislative history materials only if the language is ambiguous. (See *People v. Cochran* (2002) 28 Cal.4th 396, 400-401.) There is no ambiguity here. These express statutory purposes are implicated when applying the statute retroactively as well as prospectively.

We also find unavailing the Attorney General's assertion that the 2018 amendment alters the retroactivity analysis. (Stats. 2018, ch. 1005, § 1.) This amendment, effective January 1, 2019, precludes a defendant charged with specified offenses from eligibility in the diversion program. (§ 1001.36, subd. (b)(2).) The Attorney General argues the fact that this amendment refers to "current, charged offenses" (§ 1001.36, subd. (b)(2)), and that the Legislature did not enact this amendment through urgency legislation, means the Legislature must have assumed the mental health diversion statute was not retroactive because otherwise the Legislature would have been concerned there would be a class of defendants with the specified prohibited offenses ("murderers and rapists") who would obtain relief before January 1, 2019. The argument is speculative. The September 2018 amendment cannot be fairly read as signaling a desire to exclude an individual, such as Hook, whose offense does not fall within the newly excluded offenses. There is nothing in the language or legislative history of the September 2018 amendments suggesting the Legislature intended to impose a rule that the eligibility for mental health deferment on *the qualifying offenses* would apply prospectively only.

The Attorney General relies on *People v. Craine* (2019) 35 Cal.App.5th 744, which reached a different conclusion on the retroactivity issue. Although the *Craine*

court's extensive statutory analysis is helpful, we do not find *Craine*'s conclusions persuasive. *Craine* agreed that "the statute confers a potentially ameliorative benefit to a specified class of persons" (*id.* at p. 754), but relied on various statutory phrases to infer an affirmative intent that the statute apply only prospectively (*id.* at pp. 755-760). We do not think this is a fair reading of the statute. Had the Legislature intended for the courts to treat section 1001.36—a statute that potentially provides less punishment—in a different manner, we would expect the Legislature to have expressed this intent clearly and directly, not in a manner that is obscure or indirect. (See *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 [to counter the *Estrada* rule, the Legislature must "demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it"]; *Weaver, supra*, ___ Cal.App.5th ___ [2019 Cal.App. LEXIS 602, at pp. *19-20].) The California Supreme Court decided *Lara* before the Legislature enacted section 1001.36 and the Legislature is deemed to have been aware of the decision and the need to clearly state its intent if it intended a statute such as section 1000.36 to apply only prospectively. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 897.)

C. *Application in This Case*

The Attorney General alternatively contends that even if the statute applies to Hook, remand is unwarranted because Hook has not made a prima facie showing of potential eligibility.

We need not delineate the particular required showing because under any standard the record discloses sufficient prima facie grounds to trigger a hearing for the court to exercise its discretion to consider whether Hook is entitled to mental health diversion.

First, Dr. Glassman's reports support that Hook suffers from a qualifying mental disorder.[4] (§ 1001.36, subd. (b)(1)(A).) The Attorney General argues this factor was not met because Dr. Glassman stated that "it is most likely" that she suffers from this qualifying disorder, rather than making a more definitive diagnosis ("with certainty"). This argument is without merit. At this stage of the proceedings, only a prima facie showing is needed. On our review of Dr. Glassman's reports, this showing was clearly made.

Second, the trial record and facts presented at the sentencing hearing support that Hook's possible mental health disorder was "a significant factor in the commission of the charged offense." (§ 1001.36, subd. (b)(1)(B).) After a forensic evaluation, Dr. Glassman opined: "[i]t appears to be quite likely that [Hook's] serious psychiatric disorder contributed to her being in a homeless situation, and to her commission of her crime, as well as her commission of prior offenses."

Third, there was at least some evidence that Hook's symptoms will respond to treatment. (§ 1001.36, subd. (b)(1)(C).) In his report, Dr. Glassman identified various treatments for Hook's condition. Although he observed Hook's denial that she suffers from a mental health disorder would make it "challenging" to successfully provide the

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4 To protect Hook's privacy interests, we do not include an extended discussion of the specifics of Dr. Glassman's diagnosis. On the issue before us, it is sufficient to note that the initial and supplemental reports support that Hook likely suffers from a qualifying disorder.

treatment, this observation does not completely negate the required factual showing at this stage of the proceedings.

Fourth, the record contains evidence supporting that Hook would consent to diversion. (§ 1001.36, subd. (b)(1)(D).)

Fifth, the record supports that Hook would agree to comply with treatment. Although Hook has been unsuccessful at probation, mental health diversion programs (including possible inpatient facilities) may be qualitatively different (and potentially more beneficial) than probation supervision. (§ 1001.36, subd. (b)(1)(E).)

Sixth, on the record before us, there are facts showing Hook does not present a risk of danger to public safety. (§ 1001.36, subd. (b)(1)(F).)

In concluding that the record supports a remand, we do not express any view on the manner in which the trial court should exercise its discretion in ruling on whether Hook is an appropriate candidate for mental health diversion under the applicable statutes. We also note that there is no evidence whether the mental health diversion statutes were raised at Hook's probation revocation hearing, and the Attorney General does not assert a forfeiture theory in this appeal pertaining to that hearing.

DISPOSITION

The judgment is reversed. The cause is remanded to the superior court with direction to conduct a mental health diversion eligibility hearing under section 1001.36. If the court determines Hook qualifies for diversion, the court may grant diversion. If Hook successfully completes diversion, the court shall dismiss the charges.

If the court determines Hook is ineligible for diversion, or Hook does not successfully complete diversion, the court shall reinstate Hook's conviction, conduct further sentencing proceedings as appropriate, and forward a certified copy of the resulting abstract of judgment to the appropriate corrections agency.

HALLER, J.

I CONCUR:

GUERRERO, J.

HUFFMAN, Acting P.J., Concurring and Dissenting.

I concur in both the reasoning and the results in the opinion except for section II, entitled: "*Mental Health Diversion.*" I disagree with the analysis in that section and therefore dissent.

The majority, following *People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted December 27, 2018, S252220 (*Frahs*), have decided that the pretrial diversion system contained in Penal Code section 1001.36,[1] must be applied retroactively to this post adjudication and sentencing case. In my view *Frahs* was wrongly decided, and I will not follow it. Recently, the Fifth Appellate District Court of Appeal has filed an opinion disagreeing with *Frahs* and finding section 1001.36 does not apply to cases which have been adjudicated and sentenced prior to the effective date of the new statute.

In the published portion of its decision in *People v. Craine* (2019) 35 Cal.App.5th 744 (*Craine*), the Fifth District concluded section 1001.36 does not apply retroactively to convicted defendants, explaining the text and legislative history of the statute "contraindicate a retroactive intent." (*Craine*, at p. 749.) Although the court concluded section 1001.36 potentially mitigates punishment for a particular class of persons, it also concluded that only those whose crimes have not yet been adjudicated fall within that class. (*Craine*, at p. 749.) It determined the primary goal of the statute is not served by retroactive application, and the secondary goals of judicial economy and fiscal savings are actually thwarted by retroactive application of the statute. (*Id*. at pp. 749-750.) The

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1 Statutory references are to the Penal Code unless otherwise specified.

court also pointed out the statute's failure to address distinctions between preconviction and postconviction dismissal of charges as weighing against retroactivity. (*Id.* at p. 750.)

The court in *Craine* reviewed law regarding retroactivity, including *In re Estrada* (1965) 63 Cal.2d 740 and *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, and it noted that the potentially ameliorative benefits of a statute are not, in themselves, dispositive of whether the statute applies retroactively. (*Craine*, *supra*, 35 Cal.App.5th at p. 754.) It then turned its discussion to the statute and to *Frahs, supra,* 27 Cal.App.5th 784. The court recognized that section 1001.36 confers a potentially ameliorative benefit to a class of persons, and it focused on who falls within that class. (*Craine*, at p. 754.)

The court considered the meaning of " ' "pretrial diversion," ' " which the statute defines as " 'the *postponement of prosecution*, either temporarily or permanently, at any point in the judicial process *from the point at which the accused is charged until adjudication* . . . .' " (§ 1001.36, subd. (c); see *Craine*, *supra*, 35 Cal.App.5th at p. 755.) The Court of Appeal was persuaded that " 'adjudication' " "is shorthand for the adjudication of guilt or acquittal." (*Ibid*.) It commented, "At most, 'adjudication' could be synonymous with the rendition or pronouncement of judgment, which occurs at the time of sentencing." (*Ibid*.) The court also pointed out that the court in *Frahs* recognized the defendant had technically been adjudicated, but the court there concluded it was not probative because that was just a description of how a particular diversion program was ordinarily designed to operate. (*Ibid*., quoting *Frahs*, *supra*, 27 Cal.App.5th at p. 791.) The *Craine* court disagreed with that reasoning.

In *Craine*, the court opined that the purpose of the diversion program was to avoid trial completely, and neither that nor statutory interpretation, which required scrutiny of the statute's text, was supported by the *Frahs* court's reasoning. The court concluded "the prosecution phase ends with the rendition of judgment and sentencing." (*Craine*, *supra*, 35 Cal.App.5th at p. 756.) Thus, "[p]ursuant to the Legislature's own terminology, pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and sentenced. Upon reaching this point of 'adjudication,' the 'prosecution' is over and there is nothing left to postpone. (§ 1001.36, subd. (c).) We see this as a clear indication the Legislature did not intend for section 1001.36 to be applied retroactively in cases such as this one." (*Craine*, at p. 756.)

The court explained that *Lara* is distinguishable because the timing requirement in the Welfare and Institutions Code did not facially preclude a retroactive application, and it found the comparison in *Frahs* to Proposition 57 to be inapt. (*Craine*, *supra*, 35 Cal.App.5th at p. 757.) It cited the preadjudicative language in section 1001.36, subdivisions (e), (g), and (h) to support its interpretation that the statute was not intended to apply retroactively. (*Craine*, at p. 757.) The court observed the textual indications are consistent with the legislative history, which indicates the statute was designed to address the inability of trial courts to order mental health treatment, counseling, or medication unless the defendant is first convicted. (*Id*. at pp. 758-759.) It also noted that mental health diversion's applicability only to less serious offenses means many defendants would be eligible for supervised release before remand would be ordered, and because mental health services are an available option for parolees, it is not likely the Legislature

intended the use of additional court resources to complete a "pretrial diversion" assessment so late. (*Id*. at p. 759.)

In my view, the *Craine* decision presents the better reasoned approach to applying the new statute to cases pending on appeal. Although the facts of this case cause one to believe Hook has some mental health issues, the question of retroactivity of legislation in criminal cases is a matter of law, not equity or sympathy. Section 1001.36 should not be retroactively applied in this case. Thus, I disagree with the majority's analysis and the disposition which remands the case to the trial court for further proceedings. I would affirm the judgment.

HUFFMAN, Acting P. J.